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Civil Monetary Remedies Available to Federal Antitrust Enforcers

By STEPHEN CALKINS*

THE ANTITRUST MODERNIZATION COMMISSION¹ (“AMC”) teed up for study two issues related to civil monetary remedies available to the federal government:

1. Should DOJ and/or the FTC have statutory authority to impose civil fines for substantive antitrust violations? If so, in what circumstances and what types of cases should such fines be available? If DOJ and/or the FTC are given such authority[,] how[,] if at all, should it affect the availability of damages awarded to private plaintiffs?
2. Should Congress clarify[,] expand, or limit the FTC’s authority to seek monetary relief under 15 U.S.C. §53(b)?²

This Article answers those questions and addresses more generally the role of federal civil monetary remedies in antitrust cases. Although logic would seem to favor addressing the issues in order—and, indeed, some arguments for civil fines also support the Federal Trade Commission’s (“FTC” or “Commission”) use of 13(b)³—the second issue is so much easier and straightforward that this Article will ad-

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1. The AMC is described at its web site, Antitrust Modernization Comm’n, Home Page, <http://www.amc.gov/> (last visited Feb. 11, 2006); see also Stephen Calkins, *Antitrust Modernization: Looking Backwards*, 41 J. CORP. L. (forthcoming 2005); Albert A. Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 BUFF. L. REV. 1029 (2003).

2. Antitrust Modernization Comm’n, Notice Requesting Public Comment, 70 Fed. Reg. 28902, 28903, § 1.E (May 19, 2005).

3. 15 U.S.C. § 53(b) (2000). This Article will use “13(b),” the more familiar reference.

dress it first. The answer is a resounding “no.” (The answer to the first question is a tentative “perhaps.”) Supporting both positions is the reality that at least without appropriate use of 13(b), our current system of antitrust remedies—even with its complicated and evolving mix of criminal penalties, federal government injunctions, state enforcement, and private injunction and treble damages actions⁴—provides insufficient deterrence of selected categories of cases and creates unfortunate incentives.

Section 13(b) is deceptively simple. It authorizes the Commission to seek and courts to grant temporary restraining orders and preliminary injunctions to end or prevent violations of “any provision of law enforced by the Federal Trade Commission” pending Commission administrative adjudicatory procedures.⁵ An initial proviso requires prompt filing of an administrative complaint. A second proviso is at the heart of the issue identified by the AMC: “*Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.”⁶ Courts have uniformly held that “authority to grant such relief includes the power to grant any ancillary relief necessary to accomplish complete justice, including ordering equitable relief for consumer redress through the repayment of money, restitution, rescission, or disgorgement of unjust enrichment.”⁷ None of those courts was the Supreme Court, however,

4. See generally Stephen Calkins, *Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties*, 60 LAW & CONTEMP. PROBS. 127 (1997); Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147 (2005); Spencer Weber Waller, *Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT. L. REV. 207 (2003).

5. 15 U.S.C. § 53(b) reads:

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond

15 U.S.C. § 53(b).

6. *Id.*

7. *FTC v. Ameridebt, Inc.*, 373 F. Supp. 2d 558, 562 (D. Md. 2005); see, e.g., *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Munoz*, 2001-2 Trade Cas. (CCH) ¶ 73,406 (9th Cir. 2001); *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir.

and very few of those cases were antitrust cases. Indeed, the Commission itself has recognized that it should proceed with special caution in seeking monetary equitable relief in antitrust cases.⁸ Hence the current dispute.

This Article explores the issues involved in the current dispute and sets out the proper role for government civil monetary antitrust remedies. Part I argues that without the FTC's ability to use section 13(b) to obtain such remedies, current antitrust remedies are insufficient because the system does not always work—and the system creates worrisome incentives. Part II sets out in detail the reasons why this FTC authority should be preserved. It does this by reviewing the legislation's language and history by explaining the importance of this authority, its limited application, and the fallacies of the arguments made against it. Part III concludes the Article by suggesting that serious consideration should be given to making monetary relief an option for selected civil cases filed by the United States Department of Justice Antitrust Division ("Antitrust Division").

I. The Insufficiency of Current Antitrust Remedies

Federal government antitrust remedies continue to be largely "bimodal."⁹ Hard-core cartel behavior is punished with seemingly ever-increasing severity by serious criminal penalties¹⁰ supplemented by state and private damages actions. Unlawful mergers are enjoined in their entirety, usually in advance of consummation. But almost all other civil antitrust violations result in nothing more, as a federal government consequence, than a time-limited injunction.¹¹ An occasional injunction has serious consequences, such as dissolution; most

1997); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Sw. Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir. 1982); *see also* *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 37 (D.D.C. 1999).

8. FTC, Policy Statement on Monetary Equitable Remedies in Competition Cases (July 25, 2003), *available at* <http://www.ftc.gov/os/2003/07/disgorgementfrn.htm> [hereinafter *FTC Policy Statement*].

9. This concept is developed in Calkins, *supra* note 4, which complements the discussion in this Section.

10. *See* Scott D. Hammond, Acting Deputy Assistant Attorney Gen. for Criminal Enforcement, U.S. Dep't of Justice, Antitrust Div., An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program, Remarks Before the ABA Midwinter Leadership Meeting (Jan. 10, 2005), *available at* <http://www.usdoj.gov/atr/public/speeches/207226.htm>.

11. *Antitrust Law Developments (Fifth)*, 1 A.B.A. SEC. ANTITRUST 755–67 (2002) (DOJ Remedies); *id.* at 653–73 (FTC Remedies).

do not. This is unfortunate because the resulting bi-modal penalties may provide insufficient deterrence and create worrisome incentives.

One can debate whether antitrust remedial consequences generally over-deter or under-deter. The Antitrust Division's international cartel program suggests that at, least until fairly recently, there was under-deterrence, and Professor Robert Lande energetically argues that there continues to be under-deterrence even after recent increases in penalties.¹² Others disagree and worry about over-deterrence.¹³ If antitrust violations are under-deterred across the board, that would be an additional reason for preserving 13(b) and/or establishing civil penalties, but the argument for preserving 13(b) and/or establishing civil penalties does not depend on any such conclusion, so I leave the debate about general deterrence to others.

In truth, we have a strange system for punishing persons who commit civil antitrust violations. In Europe the civil fine is the tool of choice.¹⁴ In the United States a federal government civil enforcement action typically ends with an injunction, usually by consent, that prevents future violations, and it is assumed that private and state damages actions will extract sufficient money from the wrongdoer to compensate victims and adequately deter other violations. The government plays the role of the volleyball setter, leaving for others the more glamorous (and lucrative) spiking. Although one might not regard this as the model system were one starting afresh, it often works reasonably well.¹⁵ Unfortunately, (a) the system does not always work, and (b) it creates worrisome incentives.

A. The System Does Not Always Work

Optimal deterrence is not total deterrence, since the antitrust system could deter every antitrust violation only by deterring substantial amounts of lawful behavior. But recall that both deterrence and victim

12. See Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. REV. (forthcoming June 2006) (draft available from Author).

13. Michael L. Denger & D. Jarrett Arp, *Criminal and Civil Cartel Victim Compensation: Does Our Multifaceted Enforcement System Promote Sound Competition Policy?*, 15 ANTITRUST 41 (2001).

14. See Damien Geradin & David Henry, *The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments* (Global Competition Law Ctr., Working Paper No. 3/05, 2005), available at <http://www.kernbureau.uva.nl/acle/object.cfm/acf12e3.pdf?objectID=03A55C8D%2DCF84%2D459F%2DB4FFB394A70448C3&download=true>.

15. See, e.g., David Balto, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 ANTITRUST L.J. 1113, 1124–25 (2005) (examples of system working). See generally Calkins, *supra* note 4.

compensation depend substantially on effective follow-on litigation that recovers sufficient money damages. There are important categories of cases where this does not happen for a variety of reasons. It has long been known that, in the words of Professor Areeda, there are "antitrust violations without damages recoveries."¹⁶ The requirements that private plaintiffs surmount the rigorous hurdles of proving standing and antitrust injury¹⁷ (as well as the other elements of their cases), when added to the commercial realities of business, make quite real the possibility that an antitrust violation will go without private punishment. As Assistant Attorney General Hewitt Pate observed, "The prospect of injunctive relief alone may not be sufficient to deter or redress violations of the antitrust laws"¹⁸ This Section will highlight physician agreements as a leading example of insufficient deterrence.

Almost two decades ago, the Justice Department, with considerable fanfare, launched three serious healthcare grand jury proceedings¹⁹—only to suffer a stinging defeat in *United States v. Alston*.²⁰ Shortly thereafter, the Antitrust Division entered into civil settlements of the other two proceedings,²¹ and since then the Division has filed

16. Phillip Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976).

17. See Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437, 438–39 (2001).

18. Letter from R. Hewitt Pate, Assistant Attorney Gen., to Deborah A. Garza, Chair, Antitrust Modernization Comm'n 2 (Jan. 5, 2005), available at <http://www.amc.gov/comments/pate.pdf> [hereinafter Pate].

19. See Rule Outlines Investigations into Practices of Medical Profession, 55 Antitrust & Trade Reg. Rep. (BNA) 965 (Dec. 8, 1988) (Assistant Attorney General Rule's speech to American Medical Association "disclosed that the Antitrust Division is conducting several grand jury investigations into allegations of anticompetitive behavior by members of the medical profession."); see also 60 Minutes with Charles F. Rule, Assistant Attorney General, *Antitrust Division*, 58 ANTITRUST L.J. 377, 393 (1989) (Rule on the reaction to his AMA speech: "I have been, frankly, astonished at the sort of reaction I received. . . . For some reason, they took it as a challenge to the entire profession, so maybe they are sending me a signal that it [(criminality)] is more prevalent than I thought."). Rule's speech was greeted with "tremendous surprise" and "made the front page of the New York Times." *Health Care and Competition, Law and Policy: Hearing Before the Fed. Trade Comm'n & the Dep't of Justice*, 53–54 (2003) (remarks of Kevin J. Grady), available at <http://www.ftc.gov/ogc/healthcarehearings/031001ftctrans.pdf> [hereinafter *Health Care Hearings*]. Although this was a new initiative, it was not the first time the Antitrust Division had proceeded criminally against white collar defendants. Cf. *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979) (real estate brokers).

20. 1991-1 Trade Cas. (CCH) ¶ 69,366 (D. Ariz. Dec. 17, 1990), *aff'd*, 974 F.2d 1206 (9th Cir. 1992).

21. Jack R. Bierig, Partner, Sidley Austin, LLP, Presentation to DOJ/FTC on Remedial Issues in Antitrust Enforcement in Health Care 3 (Oct. 1, 2003), available at <http://www.ftc.gov/ogc/healthcarehearings/docs/031001jackbiering.pdf> (discussing *United States v. Burgstiner*, 56 Fed. Reg. 6681 (Feb. 19, 1991); see also 22 Obstetrician/Gynecologists in

only one criminal case involving health-care providers.²² As Kevin Grady has observed, "[T]he Division made the strategy decision that . . . criminal prosecutions in the healthcare industry were more pain than gain, and that prosecutorial resources could be better spent elsewhere."²³ Whether that is a good thing I leave for others to decide.²⁴ Government-sought remedies have usually been limited to a "'go forth and sin no more' cease and desist order."²⁵ But here, class actions and other follow-on suits appear to be largely missing in action. Physicians regularly file treble damages actions as plaintiffs who are excluded from some medical facility, and they may find themselves as medical-facility-control-group defendants on the other side of those cases, but private antitrust lawsuits virtually never follow-on government challenges to physician price fixing.²⁶ It appears that the

Georgia Settle Division's Fee Exchange Accusations, 60 Antitrust & Trade Reg. Rep. (BNA) 240 (Feb. 14, 1991) (case had been referred from FTC)); Toby G. Singer & Helen-Louise Hunter, *Criminal Investigation and Enforcement of the Antitrust Laws in the Health Care Field*, 2 ANNALS HEALTH L. 67, 71-72 (1993) (also discussing *United States v. Mass. Allergy Soc'y, Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,846 (D. Mass. 1992) (consent decree)).

22. Complaint, *United States v. Lake Country Optometry Soc'y*, No. W-95-CR-114 (W.D. Tex. Dec. 15, 1995); see also Thomas L. Greaney, *Chicago's Procrustean Bed: Applying Antitrust Law in Health Care*, 71 ANTITRUST L.J. 857, 892 n.148 (2004) (noting the many threats to file criminal suits).

23. *Health Care Hearings*, *supra* note 19, at 54. The Division continues to claim that it "is prepared to bring criminal prosecutions in healthcare where there is a blatant violation of the antitrust laws and clear harm to consumers." *Id.* at 12-13 (remarks of DOJ's Gail Kursh). Even supporters of increased criminal enforcement, however, caution that it should be preceded by clear public announcements of the decision "to modify their unspoken policy" or proceeding only civilly. See David Marx, *Messenger Models: What Can the Agencies Do to Prevent Provider Networks from Violating the Antitrust Laws?*, HEALTH L. NEWS 24, 25 (Apr. 2005).

24. For the argument against substantially increased penalties against health care professionals, see Bierig, *supra* note 21.

25. Marx, *supra* note 23, at 25; see also Greaney, *supra* note 22, at 893 ("Typically, the government's consent orders have been wrist slaps, doing little more than enjoining future misconduct—even in cases involving obvious cartel activities.") (footnote omitted).

26. See Marx, *supra* note 23, at 28. Even some people who suggest that treble damages provide sufficient deterrence and that criminal enforcement is rarely necessary fail to provide much evidence of treble damages being imposed. See Bierig, *supra* note 21, at 8.

It is worth recalling that, in addition to government actions, private treble damage actions are available. As you know, defendants who lose such actions get to pay, not only treble damages, but also the plaintiffs' attorneys fees—even if only injunctive relief is granted. There have been many such cases, e.g., *Int'l. Healthcare Mgmt. v. Hawaii Coalition for Health*, 322 F.3d 600, 605 (9th Cir. 2003), decided just this year. There are plaintiffs' antitrust attorneys and class action attorneys ready to move in if an arguable antitrust violation has occurred. Moreover, managed care plans and others who feel that providers are acting anticompetitively are not shy about threatening antitrust litigation. The threat of private treble damage actions is deterrent enough for those who would ignore antitrust requirements.

most logical payor-plaintiffs are loath to sue providers with whom they desire a long-term mutually beneficial business relationship.²⁷

The inevitable result of this lack of deterrence is continued government antitrust actions.²⁸ Whether or not legal ambiguities or aggressive promoters of various schemes contribute to the problem, and even recognizing that respondents may agree to consent orders simply to dispose of matters (without having done anything illegal), there is something wrong when government agencies challenge very similar behavior by responsible professionals year after year without achieving effective deterrence.²⁹ As Professor Greaney has observed, "An epidemic of unvarnished cartelization schemes has surfaced and continued despite the numerous civil and administrative cases filed by the federal agencies over the last twenty years."³⁰ FTC Chairman Majoras has noted that the agency has "physician groups comprising some 20,000 physicians under order—by some estimates, that is 10 percent of all doctors in the country." She wonders "why the message is not

Id.

Unfortunately for the strength of this position, the cited case affirmed the granting of a defense motion for summary judgment on all claims, so although it proves that a private treble damages case has been filed against, among others, a physicians group, it does not prove that an action has been filed successfully.

27. Marx, *supra* note 23 ("Finally, it is most unusual for payors—who are the victims of the anticompetitive conduct of provider networks—to pursue private actions against their networks, and that is unlikely to change for the obvious reason that litigation would chill any desire providers might have to contract with a payor on favorable terms in the future."); *Health Care Hearings*, *supra* note 19, at 96 (remarks of Kevin Grady) ("[T]he payors aren't going to have the chutzpah to go in and challenge the doctors that they need to have in their networks later. That's just not going to happen.").

28. *See Health Care and Competition, Law and Policy: Hearing Before the Fed. Trade Comm'n & the Dep't of Justice*, 49 (2003) [hereinafter *Singer Remarks*] (remarks of Toby Singer) ("The core remedies have been the typical cease and desist, don't do it any more remedies, with a little bit of fencing in . . . And that, of course, didn't have much impact.").

29. *Health Care Hearings*, *supra* note 19, at 94 (remarks of Kevin Grady) ("I think, after 20 years of these consent orders and seeing the same types of activities, and the Agencies coming down saying these are price-fixing, these are illegal activities, it's almost like Groundhog Day. I mean, it just keeps repeating and repeating.").

30. Greaney, *supra* note 22, at 892 (noting that the FTC challenged fourteen instances of physician price fixing in 2002–03 alone); *see also Health Care Hearings*, *supra* note 19, at 54, 57 (remarks of Kevin Grady) ("As a result of the lack of any criminal bite to violations of the federal antitrust laws in the healthcare industry, . . . I believe that there's been a definite decline in concern for the antitrust laws When the Agencies announce that they've challenged or uncovered naked agreements to fix prices, but then resolve the claims with a civil consent order that basically says 'Go and sin no more,' that creates the impression within the healthcare industry that antitrust violations are a mere irritant."); Marx, *supra* note 23, at 15 ("The Agencies' apparent abandonment of that [criminal] enforcement option over the past eight years may have caused provider networks to become more brazen in their collective dealings with payors.").

being heard and whether we can improve our effectiveness”³¹ The simple answer is that profitable illegal activities will continue unless they are adequately deterred, and government antitrust agencies are not adequately deterring problematic physician behavior.

Although physician agreements may be the leading example of insufficient deterrence, the problem is inherent in a system in which government consequences leap from modest to massive, rather than increasing in severity with the severity of the wrong-doing. Where private and state suits fail to fill the gap, as inevitably will happen from time to time, victims go uncompensated, and wrongful conduct goes inadequately deterred.³²

B. Worrisome Incentives

Without in any way suggesting any lack of good faith, one can point out some troubling incentives created by the current system of bi-modal federal sanctions.³³ If the Antitrust Division or the FTC proceeds with a civil challenge to attempted or actual price fixing or market division—and some such cases are challenged civilly³⁴—the federal government remedy is likely to be limited to an injunction that can be described, often with some justification, as an order not to do it again. On the other hand, if the same conduct is successfully challenged criminally, it can be punished with prison time and massive individual and corporate fines, as well as the image-shattering pros-

31. Deborah Platt Majoras, Reflections on My First Year, Remarks at the 2005 ABA Annual Meeting 12 (Aug. 6, 2005) (citing five new orders entered in the past year), *available at* <http://www.ftc.gov/speeches/majoras/050806abamtg.pdf>.

32. For additional examples, see Calkins, *supra* note 4, at 149–53.

33. Examples of this problem are provided in Calkins, *supra* note 4, at 136–39.

34. See, e.g., Superior Court Trial Lawyers Ass’n v. FTC, 493 U.S. 411 (1990). Compare *United States v. Mathworks, Inc.*, 2003 U.S. Dist. LEXIS 4622 (E.D. Va. Mar. 6, 2003) (consent judgment entered), with *Complaint at 33, United States v. Mathworks, Inc.*, 2003-1 Trade Cas. ¶ 73,794 (CCH) (E.D. Va. 2002) (No. 02-888-A) (alleging “a per se illegal market allocation and price-fixing agreement”), *available at* <http://www.usdoj.gov/atr/cases/f11300/11369.htm>, and *United States v. Village Voice Media, LLC*, 2003-1 Trade Cas. (CCH) ¶ 74,061 (N.D. Ohio Feb. 12, 2003), 2003 WL 21659092 (consent order), with *Complaint at 48, United States v. Village Voice Media, LLC*, 2003-1 Trade Cas. (CCH) ¶ 74,061 (N.D. Ohio 2003) (No. 1:03CV0164), 2003 WL 22019521 (alleging per se illegal “horizontal market and customer allocation agreement designed to eliminate competition” that resulted in rate hikes). In *FTC v. Warner Chilcott Holdings Co. III, Ltd.*, the FTC filed a civil challenge to what Chairman Majoras described as “a naked agreement not to compete and to share the resulting profits between a branded drug seller and its only prospective generic competitor.” *Complaint, FTC v. Warner Chilcott Holdings Co. III, Ltd.*, (D.D.C. Nov. 7, 2005), *available at* <http://www.ftc.gov/os/caselist/0410034/051107comp0410034%20.pdf>; Press Release, Fed. Trade Comm’n, FTC Sues to Stop Anticompetitive Agreement in U.S. Drug Industry (Nov. 7, 2005).

pect of a felony conviction. The striking disconnect between those two outcomes creates an incentive to favor criminal enforcement. When criminal antitrust investigations are initiated, the choice is often between filing an indictment and taking no action.

The lack of attraction to proceeding civilly is born out by the numbers. During the five years starting in 2000, the Division has filed an average of only 2.4 civil nonmerger cases a year, compared to 44.6 criminal cases.³⁵ When in the late 1980's the Antitrust Division decided to increase the seriousness with which antitrust was taken by physicians, it leapt right to criminal enforcement, which was ultimately unsuccessful.³⁶ Earlier that same decade a previous administration sent its own signal about the seriousness of antitrust when it decided controversially "to be remembered for bringing the first criminal felony resale price maintenance case."³⁷ In both situations, had an alternative, mid-level remedy been available, it might have been wiser to have tried that first.

The two federal antitrust agencies' general lack of financial penalty creates another unfortunate incentive. It is human nature to want to punish a wrongdoer.³⁸ When the wrongdoer has posed a substantial challenge, say, by resisting the government, the temptation is all the stronger. How satisfying can it be to work long hours litigating against, well, lawyers, when the "prize" for winning is the right to impose a wrist-slap, telling the wrongdoer to behave next time? Nor can an enforcement agency consider itself successful if unlawful behavior is not deterred.³⁹ To be sure, injunctions legally may not be punitive⁴⁰—but it has to be tempting to make them punitive. Orders are regularly justified as imposing various obligations in order to prevent future vio-

35. U.S. Dep't of Justice, Antitrust Division Workload Statistics FY 1995–2004, *available at* <http://www.usdoj.gov/atr/public/workstats.htm>.

36. See generally *supra* note 19 and accompanying text.

37. Margaret B. Carlson, *Discounters Decry Easing of Antitrust Enforcement*, *LEGAL TIMES*, Apr. 12, 1982, at 6; see also *United States v. Cuisinarts, Inc.*, [U.S. Antitrust Case Summaries 1980–1988] Trade Reg. Rep. (CCH) 53,436–37 (D. Conn. Dec. 19, 1980) (accepting nolo contendere plea and ordering \$250,000 fine in criminal resale price maintenance case).

38. Cf. *Health Care and Competition, Law and Policy: Hearing Before the Fed. Trade Comm'n & the Dep't of Justice*, 122 (2003) [hereinafter Kursh Remarks] (remarks of Gail Kursh, Dep't of Justice) ("Even though we may want to punish or we think a little bit more would deter someone else there, we have to circumscribe our relief for the legitimate purpose . . .").

39. Cf. Majoras, *supra* note 31 (wondering "why the message is not being heard and whether we can improve our effectiveness").

40. See, e.g., Kursh Remarks, *supra* note 38, at 5 ("The only legitimate goal of a civil antitrust remedy . . . is to restore competition to the marketplace. Thus, the remedy must not be punitive. That's the job for criminal enforcement.").

lations, yet, speaking frankly, who is *less* likely to violate some clear antitrust rule than a firm just found liable for doing so, at least if that finding of liability had some serious consequence? Although government lawyers crafting decrees attempt to work honorably with blinders keeping them focused on proper issues, it must be difficult to resist an occasional glance at issues of punishment or deterrence.⁴¹

Terms in an order that are more onerous than needed punish not only the defendant/respondent, but also the general public, which suffers when resources are wasted on unimportant compliance and especially when procompetitive activities are foregone because of such an unduly stringent order. To be sure, the antitrust agencies are aware of this problem and attempt to minimize it;⁴² yet it remains a problem in Sherman Act section 2 cases, which allege monopolization or attempted monopolization. During the Microsoft saga, the list-servers saw a number of commentators wishing that the antitrust system could simply impose a massive fine and then set Microsoft on its way, free to compete vigorously, but fully aware that any misstep could bring further litigation and penalties.⁴³ That option was simply unavailable in our system.⁴⁴ Where behavior is lawful in some contexts but not in others, as is typical for section 2 cases, it is very hard to write a good conduct order.

The above review of the insufficiency of current government antitrust remedies was made with one qualification: the FTC has, on rare occasion, supplemented other remedies by obtaining monetary equitable relief. That authority should be preserved.

41. Cf., e.g., Singer Remarks, *supra* note 28, at 49 (Because the standard health care consent order "didn't have much impact . . . more recently, there have been other remedies that are introduced into these orders that at least in some cases may have an effect on the particular market in which the physicians have been accused of wrongdoing, even if not more broadly . . .").

42. See, e.g., Kursh Remarks, *supra* note 38, at 6 ("[W]e know that remedies can have unintended effects in the marketplace. So it's our job to try to predict such effects or consequences to the extent we can, and avoid them if that's possible.").

43. Cf., e.g., Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 97 (2001) ("The shortcomings inherent in the various injunctive remedies proposed in the Microsoft case counsel one to reconsider seriously the efficacy and feasibility of monetary remedies."); Neil R. Stoll & Shepard Goldfein, *Microsoft—Remedies in Monopoly Cases*, N.Y. L.J., Feb. 15, 2000, at 3 (reviewing problems with behavioral and structural remedies).

44. It was an option in Europe, but enforcers there chose to impose both a €497 million fine and conduct provisions. Press Release, European Comm'n, Commission Concludes on Microsoft Investigation, Imposes Conduct Remedies and a Fine (Mar. 24, 2004), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/382&format=HTML&aged=1&language=EN&guiLanguage=EN> (last visited Mar. 23, 2006).

II. Congress Should Not Change the FTC's 13(b) Authority

Addressing both whether to increase DOJ's authority to seek monetary equitable relief or civil fines and whether FTC monetary equitable relief authority should be clarified, the AMC's Civil Procedure and Remedies Working Group ("Working Group") wrote that "[t]here is general agreement that the agencies have made considerable efforts recently to address these issues and that they are not a high priority for additional reform efforts."⁴⁵ At least with respect to FTC monetary equitable relief, the Working Group was correct although it later abandoned its own recommendation.⁴⁶ This is an issue that should be left alone.

One reason to leave it alone is because the courts are fully equipped to deal with the issue. As noted above, it is settled law that section 13(b) authorizes monetary equitable relief.⁴⁷ If, however, the critics are right and 13(b) does *not* authorize monetary equitable relief,⁴⁸ no congressional action is needed because the courts will take care of the matter. Plenty of 13(b) cases are litigated every year, so there is ample opportunity for courts to correct any misreading. Defendants are fully capable of pointing to any possible Commission abuses when making their cases in court.

There is more to the argument for congressional inaction than merely the suggestion to defer to courts. In particular, other justifications include: (1) the language and history of 13(b) support applying monetary equitable relief in competition cases and not merely consumer protection cases, and to award permanent injunctions; (2)

45. Memorandum from Civil Procedure and Remedies Working Group to All Commissioners 14 (Dec. 21, 2004), *available at* <http://www.amc.gov/pdf/meetings/CivilProcedure.pdf>.

46. After the Working Group submitted its report, it received a letter from Assistant Attorney General Hew Pate that recommended studying whether to endorse federal government civil fine authority. Pate, *supra* note 18, at 2. Several members of the Working Group reacted by deciding that it was preferable to review private remedies in the context of government remedies. Antitrust Modernization Comm'n, Transcript of Meeting 99 (Jan. 13, 2005), *available at* <http://www.amc.gov/pdf/meetings/transcript050113.pdf>. The initial list of issues selected for study included the issue recommended for rejection, "Should government civil remedies be expanded, restricted, or clarified?," Antitrust Modernization Comm'n, Issues Selected for Study, *available at* http://www.amc.gov/pdf/meetings/study_issues.pdf (last visited Feb. 24, 2006).

47. See *supra* note 7 and accompanying text.

48. See Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139 (1992); Ivy Johnson, *Restitution on Behalf of Indirect Purchasers: Opening the Backdoor to Illinois Brick*, 57 WASH. & LEE L. REV. 1005 (2000); Michael S. Kelly, *In Seeking Dollars from Drug Concerns, FTC Oversteps Bounds of Law*, LEGAL TIMES, Mar. 8, 1999, at S34.

monetary equitable relief plays a critical role in consumer protection cases, and preserving that role while abolishing its use in antitrust cases would be problematic; (3) it potentially plays an important role in selected antitrust cases; (4) the FTC's monetary equitable relief policy for competition cases is extremely limited; and (5) the arguments typically made to support change are unpersuasive. As noted above, the argument does *not* depend on a belief that even when the antitrust system's full array of penalties—corporate criminal fines, individual fines and incarceration, private treble damages, *parens patriae* actions, and state actions—are brought to bear, inadequate deterrence is achieved. If that is true, it provides an additional argument for preserving 13(b), but there is a compelling case regardless.⁴⁹

A. Section 13(b)'s Language and History Support Its Application in Competition Cases and Awarding Permanent Injunctions

Critics of the FTC obtaining monetary equitable relief in antitrust cases have suggested that this power is really a consumer protection power.⁵⁰ Nothing could be further from the truth. Nor is it fair to

49. This Article's argument for preserving 13(b) also does not depend on any suggestion that monetary equitable relief might be important in cases reachable only to the extent that section 5 extends beyond the antitrust laws. See AM. ANTITRUST INST., COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE WORKING GROUP ON REMEDIES 14 (2005), available at http://www.amc.gov/public_studies_fr28902/remedies_pdf/AAI_Remedies.pdf [hereinafter AAI REMEDIES COMMENT] ("In addition, the FTC Act is broader than the Sherman Act and the Clayton Act, and disgorgement actions can, at least in theory, assure some level of deterrence in a wider range of cases.").

50. In addition to calling for limiting part of the reach of 13(b) to consumer protection cases, critics have argued more broadly that even if it once seemed permissible to read section 13(b) broadly, more recent Supreme Court teaching has shown the error of this approach. See *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 487–88 (1995); *United States v. Philip Morris USA Inc.*, 396 F.3d 1190 (D.C. Cir. 2005) (disgorgement unavailable under RICO). It would be a remarkable reversal were the Court to change the basic approach to finding implied remedies that has been at the core of powers enjoyed by the FTC, the SEC, and other governmental agencies. See 2 FEDERAL SECURITIES EXCHANGE ACT OF 1934, at 9–113 (A.A. Sommer, Jr., ed., 2005) ("Although the federal securities statutes do not grant the Commission express statutory authority to obtain disgorgement from defendants in injunctive actions, courts have long held that they may, in the exercise of their equitable powers, order the disgorgement of profits or losses avoided as a result of conduct in violation of the federal securities laws."); 8 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 3775–83 (3d ed. 2004) (disgorgement authority long implied in SEC cases); 10 *id.* at 4713–23 (ancillary relief); see also Eric M. Blumberg, *Universal Management, Abbott, Wyeth, Schering-Plough, and . . . : Restitution and Disgorgement Find Another Home at the Food and Drug Administration*, 58 FOOD & DRUG L.J. 169 (2003) (reviewing FDA's use of equitable authority in three consent decrees and one successfully litigated case). *Meghrig* need not and probably should not be read that broadly. See *United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 220 (3d Cir. 2005) (FDA impliedly authorized to seek restitution). That particular legal dispute, however, is beyond the scope of this Article.

suggest that Congress really intended to give the Commission the power to seek only preliminary injunctions. In section 13(b), Congress gave the Commission "broad, new injunctive authority."⁵¹

It is a real stretch to try to limit 13(b) to consumer protection cases. The Trans-Alaska Pipeline Act⁵² was passed in response to one of America's recurrent energy crises.⁵³ Section 408 (the section in question) declared that its purpose was to help the FTC "avoid unfair competitive practices"⁵⁴—not deceptive practices, but "competitive" practices. This provision was introduced as an amendment on the Senate floor by Senator Henry Jackson, so no regular committee report illuminates the meaning of the words, but Senator Jackson boldly declared the purpose of his amendment, which would give the FTC "major new statutory authority":⁵⁵ "Mr. President, the purpose of the amendment I am introducing today is to grant the Federal Trade Commission the full range of powers and legal authority it needs to both identify and prevent unfair methods of competition and anticompetitive conduct."⁵⁶ Similarly, what little debate there was referred more frequently to antitrust than to consumer protection concerns.⁵⁷

51. *Introduction: Antitrust Amendments of 1973*, in 6 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATES 4949 (Earl W. Kintner ed., 1983) (nicely chronicling the legislative history).

52. Trans-Alaska Authorization Pipeline Act, Pub. L. No. 93-153, 87 Stat. 584 (1973) (amending 15 U.S.C. §§ 45-46, 53, 56).

53. As the FTC Chairman wrote to a member of the Conference Committee: [T]he occasion for incorporating these provisions in the present legislation was the realization by yourself and other Members of Congress, at the time of the acute gasoline shortage last spring, that because it lacked the authority to seek preliminary injunctions the Commission would have been completely powerless to aid the small gasoline retailer, distributor, or refiner, even assuming there had been proof of the most blatant anticompetitive behavior by their major competitors.

119 CONG. REC. 36,610 (1973) (quoted in remarks of Rep. Johnson).

54. Pub. L. No. 93-153, tit. IV, § 408(b), 87 Stat. 591 (1973).

55. 119 CONG. REC. 22,797 (1973) (statement of Sen. Jackson); *see also* 119 CONG. REC. 21,443 (1973) (statement of Sen. Jackson) (identical language).

56. 119 CONG. REC. 22,979 (1973) (statement of Sen. Jackson). Senator Jackson used identical words when he introduced the same amendment to a different bill fifteen days earlier. 119 CONG. REC. 21,443 (1973) (statement of Sen. Jackson). Senator Jackson noted that the FTC's General Counsel had complained that other proposed legislation would have authorized injunctions only against "deceptive practices," whereas the General Counsel believed the authority should not be so limited. 119 CONG. REC. 22,979 (1973) (statement of Sen. Jackson) (quoting June 15, 1973 letter from Ronald M. Dietrich); *see also* 119 CONG. REC. 21,443 (1973) (statement of Sen. Jackson) (identical wording).

57. *See, e.g.*, 119 CONG. REC. 36,612 (1973) (remarks of Rep. Dingell) (lauding the "antitrust enforcement efforts of the Commission"); 119 CONG. REC. 36,597 (1973) (remarks of Rep. Melcher) ("remove the roadblocks to quick adjudication of antitrust viola-

Some confusion has resulted from the failure of Senator Jackson and other proponents of the amendment to discuss the kind of "proper cases" for the Commission to seek permanent injunctions. Although Senator Jackson justified proceeding by floor amendment because "similar authority was passed by the Senate in the last Congress as part of the [proposed] Magnuson-Moss Warranty Act,"⁵⁸ the referenced bill did not include the permanent injunction proviso that is the source of the Commission's equitable authority.⁵⁹ That proviso was also missing from the bill that Senators Magnuson and Moss introduced in January 1973;⁶⁰ it appeared for the first time in the bill reported out four months later.⁶¹ The accompanying Report's entire discussion of the change is as follows:

Provision is also made in section 210 for the Commission to seek and, after a hearing, for a court to grant a permanent injunction. This will allow the Commission to seek a permanent injunction when a court is reluctant to grant a temporary injunction because it cannot be assured of a[n] early hearing on the merits. Since a permanent injunction could only be granted after such a hearing, this will assure the court of the ability to set a definite hearing date. *Furthermore, the Commission will have the ability, in the routine fraud case, to merely seek a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order.* Commission resources will be better utilized, and cases can be disposed of more efficiently.⁶²

tions"); *cf.* 119 CONG. REC. 36,614 (1973) (remarks of Rep. Rodino) (FTC needs these powers "to protect the public from antitrust violations and economic deceptive practices."); 119 CONG. REC. 36,605 (1973) (remarks of Rep. Evins) ("I have introduced [similar] legislation to strengthen the powers of the Federal Trade Commission in its efforts to curb false and deceptive trade practices."); 119 CONG. REC. 36,605 (1973) (remarks of Rep. Smith) (referring to both "anticompetitive and anticonsumer practices").

58. 119 CONG. REC. 21,443 (1973) (statement of Sen. Jackson).

59. See 15 U.S.C. § 53(b) (2000); *see also supra* note 7; S. 986, 92d Cong. § 210 (1971), as reported in S. REP. NO. 92-269, at 41 (1971); *id.* at 28-29 (section analysis). That bill expressly authorized the Commission to seek consumer redress after entry of a Commission cease and desist order. S. 986 § 203; *see also* S. REP. NO. 92-269, at 24-25 (section analysis); *id.* at 5 (quoting ABA report on the importance of "some form of private relief for or on behalf of consumers" and noting that FTC Chairman Weinberger had requested "authority to award damages to consumers injured by acts of practices found by the Commission to violate the law"). The bills reported out in the two preceding Congresses also would have authorized the seeking only of preliminary injunctions. S. 3201, 91st Cong. § 102 (1970), as reported in S. REP. NO. 91-1124, at 21 (1970) (also providing for consumer redress); S. REP. NO. 90-1311, at 15 (1968) (accompanying S. 3065).

60. S. 356, 93d Cong. § 210 (as introduced, Jan. 12, 1973).

61. S. REP. NO. 93-151, at 28 (as reported by S. Comm. on Commerce, May 14, 1973).

62. *Id.* at 30-31 (emphasis added).

The reference to “the routine fraud case” makes sense only when one remembers that the reported bill, like all the predecessor bills, would have authorized injunctions only against “unfair or deceptive” acts or practices. The more generic explanation is the one with some applicability to “unfair methods of competition” antitrust cases: the Commission may seek a permanent injunction “in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease and desist order” because by this it means “Commission resources will be better utilized, and cases can be disposed of more efficiently.”⁶³ This explication is just as applicable to appropriate antitrust as to appropriate consumer protection cases.

Critics of the use of monetary equitable relief emphasize the extent to which Congress thought about section 13(b) as authorizing the use of preliminary injunctions. As one analysis argues, “Congress designed this legislation to eliminate the long-recognized deficiency in FTC enforcement power that allowed respondents to carry on their activities until FTC issuance of a final cease and desist order”⁶⁴ In truth, the FTC requests for congressional assistance did emphasize preliminary injunction authority.⁶⁵ At least one member of Congress also emphasized this authority.⁶⁶

Even were such emphasis widespread, it could not override the words of the legislation, which explicitly authorize the use of permanent injunctions.⁶⁷ But, if it mattered, there is every reason to believe that Congress knew what it was doing. When he introduced his amendment, Senator Jackson referred sweepingly to giving the FTC “the full range of powers and legal authority it needs to both identify and prevent unfair methods of competition and anticompetitive con-

63. *Id.* at 31.

64. Ward, *supra* note 48, at 1175. But *cf. id.* at 1178 (reluctantly acknowledging the permanent injunction proviso).

65. 119 CONG. REC. 21,435 (1973) (statement of Sen. Jackson) (quoting June 15, 1973 letter from FTC General Counsel Ronald M. Dietrich requesting the power “to seek such preliminary injunctions”); *see also* Letter from Lewis A. Engman, Chairman, Fed. Trade Comm’n, to Rep. Harold T. Johnson, House of Representatives (Nov. 9, 1973) (describing the bill as authorizing the Commission “to seek temporary injunctions”), as reprinted in 119 CONG. REC. 36,610 (1973) (remarks of Rep. Johnson).

66. 119 CONG. REC. 36,609 (1973) (remarks of Rep. Smith) (“It is only good sense that where there is a probability that the act will eventually be found illegal and the perpetrator ordered to cease, that some method be available to protect innocent third parties while the litigation winds its way through final decision.”).

67. 15 U.S.C. 53(a) (2000).

duct.”⁶⁸ A formal analysis of the amendment by one of the House managers accurately explained that the bill “would authorize the Commission to seek temporary or permanent restraints of imminent or actual violations of the laws under its enforcement cognizance.”⁶⁹ The Report of the Conference Committee was more vague, saying that the legislation “gave the Commission broader authority to initiate injunction actions,”⁷⁰ and most Members were similarly imprecise⁷¹—but wholly consistent with the ordinary meaning of the words enacted into law.

The strongest legislative-history-based argument of critics of monetary equitable relief is that shortly after enacting section 13(b), Congress passed the Magnuson-Moss Warranty Federal Trade Commission Improvement Act⁷² that, among other things, added section 19 to the FTC Act.⁷³ Section 19 authorizes the Commission to seek consumer redress in specified categories of cases.⁷⁴ Indeed, one can trace both the Commission’s section 13(b) authority to seek injunctions and its section 19 redress authority (at least after entry of final cease and de-

68. 119 CONG. REC. 22,979 (1973) (statement of Sen. Jackson); 119 CONG. REC. 21, 443 (1973) (statement of Sen. Jackson) (introducing same amendment to a different bill). Senator Jackson was not entirely consistent. After the conference report had been agreed to, he printed in the record a letter he and two other Senators had sent to President Nixon urging him to support the legislation in the face of lobbying focused on two provisions, on of which, they said, would “grant modest but much-needed new authority to the Federal Trade Commission to enable it to enforce more efficiently the laws under its jurisdiction.” Letter from Senators Jackson, Melcher & Gravel to Richard M. Nixon, President of United States (Nov. 9, 1973), as reprinted at 145 CONG. REC. 36,809 (1973).

69. 119 CONG. REC. 36,610 (1973) (remarks of Rep. Johnson) (adding that the legislation “would provide the Commission with comparable authority to that already possessed by the Attorney General in antitrust cases”); see also 119 CONG. REC. 23,620 (1973) (remarks of Sen. Hart) (describing the just-Senate-passed amendment as giving the FTC “the power to seek preliminary and permanent injunctions where necessary”).

70. H.R. REP. NO. 93-624, at 23 (1973) (Conf. Rep.).

71. 119 CONG. REC. 36,597 (1973) (remarks of Rep. Melcher) (important to “remove the roadblocks to quick adjudication of antitrust violations”); 119 CONG. REC. 36,606 (1973) (remarks of Rep. Udall) (“The FTC will have subpoena (sic) and injunctive power and be able to initiate, prosecute, and appeal violations of the Federal trade laws.”).

72. Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended in scattered sections of 15 U.S.C.).

73. 15 U.S.C. § 59 (2000).

74. See Ward, *supra* note 48, at 1179–84; Johnson, *supra* note 48, at 1014; Michael N. Sohn & William J. Baer, *Injunctions Emerge as FTC’s Powerful New Weapon*, LEGAL TIMES, Mar. 22, 1982, at 14 (“If Congress had already authorized the FTC to seek redress for fraud when it enacted §13(b) in 1973, why was it necessary in 1975 to enact §19(a)(2), which specifically provides for similar relief, but only after an administrative proceeding?”); Michael S. Kelly & Bilal Sayyed, *FTC’s Quest for Money Damages: An Unauthorized Power Grab*, LEGAL BACKGROUNDER (Wash. Legal Found., Wash., D.C.), June 11, 1999 (Section 19 “would be entirely unnecessary if the FTC’s current reading of Section 13(b) is correct.”).

sist orders) to the same bill.⁷⁵ Although one could reconcile that bill's implicit provision for monetary equitable relief (in cases not deserving administrative adjudication) and its explicit provision for consumer redress after an administrative adjudicated order became final, the relevant Committee report makes no such explication.⁷⁶ Nor does the Conference Report on the Magnuson-Moss bill suggest that Congress contemplated that section 13(b) could be used to obtain equitable monetary relief.⁷⁷ This Report was issued a year after section 13(b) had become law and explained a decision to provide for consumer redress, as had the Senate but not the House.

It would be a mistake to make too much of this, however. Section 19 explicitly declares that the "[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law."⁷⁸ Although the Conference Report makes reference to a specific dispute about the Commission's authority to seek redress,⁷⁹ the words of the statute are sweeping. The failure of Congress to set out a full analysis of the intersection between section 13(b) and section 19 is unsurprising, since the Senate Committee Report was issued

75. S. REP. NO. 93-151, at 42-44 (1973) (court redress actions authorized following the entering of certain final cease and desist orders).

76. See S. REP. NO. 93-151 (1973).

77. H.R. REP. NO. 93-1606, at 40-42 (1974) (Conf. Rep.); see also H.R. Rep. No. 93-1107, at 87-88 (1974) (separate views of Rep. Broyhill et al.) (explaining House decision to strike consumer redress provision from bill); cf. Lewis A. Engman, *Report from the Federal Trade Commission*, 44 ANTITRUST L.J. 161, 164 (1975) (FTC chairman explaining that the 1975 Magnuson-Moss Act "created a wholly new approach" to consumer redress that is "capable of tremendous flexibility").

78. 15 U.S.C. § 57(b).

79. The House Report noted:

The authority of the Commission to seek consumer redress encompassed by the Conference substitute deals exclusively with civil actions brought by the Commission and relief granted by the courts in those actions. The section is intended to supplement the ability of the Commission to redress consumer and other injury resulting from violations of its rules or of section 5(a) of the Federal Trade Commission Act and is not intended to modify or limit any existing power the Commission may have to itself issue orders designed [for] remedying violations of the law. That issue is now before the courts. It is not the intent of the Conferees to influence the outcome in any way.

H.R. REP. NO. 93-1606, at 42 (1974) (Conf. Rep.).

Heater v. FTC, 503 F.2d 321 (9th Cir. 1974), held that section 5(b) of the FTC Act did not authorize the Commission to award restitution to injured consumers, but the Commission has consistently asserted its disagreement with *Heater*. E.g., Elec. Computer Programming Inst., 86 F.T.C. 1093, 1095 (1975).

before Senator Jackson even proposed section 13(b),⁸⁰ and the bill reported by the House did not include language explicitly authorizing redress.⁸¹ That Senate Report did accompany a bill that provided both for preliminary and permanent injunctions and explicitly for consumer redress, but for redress only after entry of a final administrative cease and desist order (such that there was no tension between the provisions).⁸² The Senate Report, although somewhat less sweeping than the statute as enacted, made clear that the new redress authority would supplement other powers.⁸³ Nothing in the wording or history of section 19 undoes what Congress accomplished in section 13(b) when it gave the Commission "the full range of powers and legal authority to both identify and prevent unfair methods of competition and anticompetitive conduct."⁸⁴ It is clear, therefore, that section 13(b)'s language and history support its application to award permanent injunctions, and presumably ancillary equitable relief, in competition as well as consumer protection cases.

B. Section 13(b)'s Critical Role in Consumer Protection Cases

The original vision of the FTC called for a group of experts to deliberate about business practices and advise well-intended business

80. See generally S. REP. NO. 93-151 (1973).

81. H.R. REP. NO. 93-1107 (1974).

82. S. 356, 93d Cong. § 203 (as reported by S. Comm. on Commerce, May 14, 1973).

83. The Senate Report stated:

This section would not affect whatever power the Commission may have under section 5 of the FTC Act to fashion relief in its initial cease-and-desist order, such as corrective advertising or any other remedy, which may be appropriate to terminate effectively unfair or deceptive acts or practices. Likewise, there is no intent on the part of the Committee to disturb the Commission's power to compel restitution by its own order when such restitution is necessary to terminate a continuing violation of section 5 Section 203 is applicable to those situations where the Commission acts to make specific consumers whole and is not intended to supplant general actions by the Commission which are designed to dissipate the prior effects of unfair or deceptive acts or practices.

S. REP. NO. 93-151, at 28 (1973).

84. 119 CONG. REC. 22,979 (1973) (statement of Sen. Jackson); see also *Introduction*, *supra* note 51, at 4949 (Commission was given "broad, new injunctive authority").

If one *were* to rely on subsequent congressional action to interpret section 13(b), one should also note evidence of subsequent congressional approval of the FTC's use 13(b) to obtain monetary equitable relief. See S. REP. NO. 103-130, at 15-16 (1994), as reprinted in 1994 U.S.C.C.A.N 1776, 1790-91 ("Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC [Act]. The FTC can go into court *ex parte* to obtain an order freezing assets, and is also able to obtain consumer redress. . . . The FTC has used its section 13(b) injunction authority to counteract consumer fraud, and the Committee believes that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts.").

leaders about what practices were “unfair.”⁸⁵ The Commission would determine that this or that method of competition was “unfair” and direct a respondent to cease engaging in it.⁸⁶ Although the Commission could issue an order against a particular firm found to have been “unfair,” there was a sense that once business leaders knew that a practice was considered “unfair,” they would refrain from engaging in it.

This genteel vision, if ever valid, proved singularly inapplicable to fraud artists, against whom the FTC started a major push during the 1980s.⁸⁷ Gradually the Commission developed the section 13(b)-based tools needed to accomplish its anti-fraud mission.⁸⁸ Today, the heart of the FTC’s consumer protection mission is using section 13(b) to combat fraud by obtaining equitable relief—temporary restraining orders, preliminary injunctions, permanent injunctions, and monetary equitable relief.⁸⁹ Although section 13(b)’s origins lie in the world of antitrust, its dominant use has been against fraud.

Presumably the AMC is not seriously considering interfering with the heart of the FTC’s consumer protection mission; after all, the AMC’s mandate is limited to antitrust. Yet the same section 13(b) applies to all of the FTC’s core jurisdiction, consumer protection, and competition alike; the question posed by the AMC asks whether Con-

85. A.B.A., *REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 6* (1969) (“To provide businessmen with a forum for evaluating the great variety of fact situations likely to arise . . . Congress created an administrative agency to implement the new statutes. The agency was designed to combine a number of features not available to the Department of Justice, including extensive fact-finding powers, special expertise in economic matters, and business advisory procedures.”).

86. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 62–68 (2003).

87. See Miles W. Kirkpatrick et al., *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 53 (1989).

88. See Calkins, *supra* note 4, at 133–36; David M. FitzGerald, Presentation at the Federal Trade Commission 90th Anniversary Symposium: The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act (Sept. 23, 2004), available at <http://www.ftc.gov/ftc/history/docs/fitzgeraldremedies.pdf>; David R. Spiegel, *History and Development of the FTC’s 13(b) Fraud Program*, in 1 ANTITRUST 43 (2004).

89. Deborah Platt Majoras, Chairman, Fed. Trade Comm’n, Remarks to the Consumer Federation of America Consumer Assembly 3 (Mar. 11, 2005), available at <http://www.ftc.gov/speeches/majoras/050311faw.pdf> (“Aggressive law enforcement is the mainstay of the FTC’s consumer protection mission. [In the past year,] the FTC has filed 83 actions in federal district court, and obtained 75 judgments ordering the return of more than \$474 million in consumer redress to consumers.”). Although the Commission regularly uses 13(b) to obtain monetary equitable relief, it occasionally uses that authority to obtain a permanent injunction without monetary relief. See, e.g., Press Release, Fed. Trade Comm’n, Court Order Bars Deceptive Investment Pitches (May 17, 2005), available at <http://www.ftc.gov/opa/2005/05/britishcapital.htm> (describing stipulated court order).

gress should change section 13(b)—not section 13(b) as applied to antitrust cases. Nor would anyone likely want to ban most of section 13(b) in antitrust cases, since this is the authority for enjoining unlawful mergers, which is near-universally seen as a core Commission function. Presumably the question is whether section 13(b) should be revised so that its permanent injunction proviso does not apply, or applies only in limited ways, to “unfair methods of competition” cases seeking monetary equitable relief. Yet competition and consumer protection law are “two wings of the same house.”⁹⁰ They share a common origin; they have a common objective in the protection of consumers; indeed, to the extent they are associated with separate parts of section 5—“unfair methods of competition” and “unfair and deceptive acts or practices”—they share the common word “unfair.”

Every so often, an investigation in one part of the Commission’s house raises issues in the other. Mischief could potentially follow from any effort to specify that some particular remedy is available for use against an “unfair or deceptive act” but not against an “unfair method of competition.” It is one thing for the Commission to treat its two missions differently as a matter of prosecutorial discretion. It would be another thing to give a defendant a statutory right to object to a remedy if the Commission filed what the respondent claimed was “really” a competition matter.⁹¹ Follow-on litigation may fail to play its salutary role for several reasons: (1) because procedural problems or standing issues prevent recovery, (2) because persons with good causes of action are loath to sue for one reason or another, (3) because recoveries are too small to be worth pursuing, or (4) likely for other reasons.⁹² The FTC’s participation may facilitate a global, national settlement.⁹³ Alternatively, private settlements for sub-optimal amounts may result

90. Thomas B. Leary, *Competition Law and Consumer Protection Law: Two Wings of the Same House*, 72 ANTITRUST L.J. 1147 (2005).

91. Any effort at statutory drafting would confront the reality that section 13(b) applies to all of the law enforced by the FTC, but also that the FTC is only one of the federal agencies using this kind of equitable authority. The SEC is the best known of these agencies, but not the only one. See *supra* note 50 and accompanying text.

92. See *Government Civil Remedies: Hearing Before the Antitrust Modernization Comm’n*, 5–6 (2005) (statement of John Graubert, Principal Deputy Gen. Counsel, Fed. Trade Comm’n), available at http://www.amc.gov/commission_hearings/pdf/Graubert_State-ment.pdf.

93. See Kevin J. O’Connor, *Is the Illinois Brick Wall Crumbling?*, 15 ANTITRUST 34, 37 (2001) (“Even though only thirty-three states were party plaintiffs in the *Mylan* matter, the fact that the FTC had obtained a disgorgement remedy supported a national distribution of a significant portion of the settlement funds to all overcharged consumers, including those who resided in states with no apparent indirect purchaser right of action, in effect nationalizing the settlement.”).

in insufficient deterrence and inadequate compensation. Although no one is suggesting that the FTC needs to be filing large numbers of these actions,⁹⁴ the apparent failure of deterrence with respect to physicians serves as a reminder that without monetary equitable relief, there are classes of cases in which deterrence is insufficient.⁹⁵

C. The FTC's Policy Is Very Limited

It is hard to overstate how limited the FTC's policy is on the use of monetary equitable remedies in traditional antitrust cases. After the Pitofsky-led Commission had established in court the availability of the remedy, the Muris-led Commission, as some had predicted,⁹⁶ carefully set out a Policy Statement on Monetary Equitable Remedies in Competition Cases ("Policy Statement").⁹⁷ As the Policy Statement observed, "[I]n the competition area . . . the Commission has moved cautiously and used its monetary remedial authority there sparingly."⁹⁸ The Commission said that it would seek monetary equitable relief only in "exceptional" competition cases,⁹⁹ chosen based on three factors: (1) "where the underlying violation is clear;" (2) where there is "a reasonable basis for calculating the amount of a remedial payment;" and (3) after considering "the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings."¹⁰⁰ The Commission said that it would take "pains to ensure that injured persons who recover losses through private damage actions under the Clayton Act not recover doubly for the same losses via FTC-obtained restitution."¹⁰¹ And, indeed, the Commission has obtained monetary redress in only a handful of competition cases¹⁰²—three in the 2000s (*FTC v. Mylan*

94. Commission experience, which can be traced back to 1969, is catalogued in Graubert, *supra* note 92, at 2–3.

95. One worrisome caveat: The FTC has not yet chosen to file any monetary equitable relief actions against physicians, even though they may well represent good examples of the need for greater deterrence. Presumably that will change as the FTC seeks greater deterrence of physician wrongdoing. See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, IMPROVING HEALTH CARE: A DOSE OF COMPETITION, A REPORT BY THE FEDERAL TRADE COMMISSION AND THE DEPARTMENT OF JUSTICE 319 (2004) ("The Agencies will carefully consider whether disgorgement is appropriate in all future cases.").

96. Deborah A. Garza, *Is the Past Prologue? A Comparative Analysis of the Clinton Antitrust Program and Suggestion of Changes to Come*, 15 ANTITRUST 64, 68 (2001).

97. FTC Policy Statement, *supra* note 8.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. For a full list through 2003, see *id.* at nn.6–8.

Lab., Inc.,¹⁰³ *FTC v. Hearst Trust*,¹⁰⁴ and *FTC v. Perrigo Co.*¹⁰⁵). Only this past fall the Commission filed a complaint against what Chairman Majoras described as a “naked agreement not to compete and to share the resulting profits between a branded drug seller and its only prospective generic competitor,”¹⁰⁶—yet the Commission’s complaint does not request monetary equitable relief. This is not an agency that is running wild with a new remedy. FTC Commissioner Thomas Leary, the best-known critic of the FTC’s use of monetary equitable relief in competition cases, has testified that his “original concerns” have been alleviated by the Commission’s Policy Statement and sees no need for legislative change.¹⁰⁷

D. The Counter-Arguments Are Unpersuasive

When an agency is acting deliberately, in a restrained fashion, to use a power it has long enjoyed (and that other agencies enjoy as well), and that is essential to part of its mission, only a strong showing can justify tampering with or partially rescinding that power. No such showing has been made with respect to the Commission’s use of section 13(b).

It is noteworthy, in this regard, that the only public comment filed on remedies that addressed section 13(b) supported its continued use to obtain monetary relief in competition cases.¹⁰⁸ Were the

103. *FTC v. Mylan Labs., Inc.*, No. 1:98CV03114 (TFH) (D.D.C. Feb. 9, 2001) (order granting permanent injunction); see *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999) (\$100 million restitution for alleged monopolization), *rev’d and reaff’d in pertinent part*, 99 F. Supp. 2d 1, 4–5 (D.D.C. 1999).

104. *FTC v. Hearst Trust*, No. 1:01CV00734 (TPJ) (D.D.C. Nov. 9, 2001) (consent) (\$19 million disgorgement for alleged anticompetitive acquisition and violation of pre-merger filing requirements).

105. *FTC v. Perrigo Co.*, File No. 021 0197 (D.D.C. Aug. 12, 2004) (\$6.25 million disgorgement from two firms for alleged market division; another \$1.5 million paid to state attorneys general). See Press Release, Fed. Trade Comm’n, Generic Drug Marketers Settle FTC Charges, (Aug. 12, 2004), available at <http://www.ftc.gov/opa/2004/08/perrigoalpharma.htm>.

106. *FTC v. Warner Chilcott Holdings Co. III, Ltd.* (D.D.C. filed Nov. 7, 2005); see also Press Release, Fed. Trade Comm’n, FTC Sues to Stop Anticompetitive Agreement in U.S. Drug Industry (Nov. 7, 2005), available at <http://www.ftc.gov/opa/2005/11/galenbarr.htm>.

107. *Hearing Before the Antitrust Modernization Comm’n: Federal Civil Remedies for Antitrust Offenses*, at 8 n.24 (Dec. 1, 2005) (statement of Thomas B. Leary) [hereinafter Leary Statement], available at http://www.amc.gov/commission_hearings/pdf/Leary_Statement_final.pdf.

108. See AAI REMEDIES COMMENT, *supra* note 49, at 13–14. For all public comments on remedies, see Antitrust Modernization Comm’n, Public Comment: Remedies, http://www.amc.gov/public_studies_fr28902/remedies.htm (last visited Feb. 26, 2006).

Commission's use of 13(b) a major problem, one would have expected *someone* to file a comment complaining about it. When the FTC invited comments on its use of monetary equitable relief in competition cases, the American Bar Association Antitrust Section, while reserving its judgment on the issue of the ultimate legality of this remedy, observed that "[d]isgorgement could be justified if the treble damage recovery or imposition of other penalties were insufficient to deprive a defendant of his ill-gotten gains."¹⁰⁹

That invitation of comments did stimulate some objections;¹¹⁰ objections also can be found in Commission opinions, in response to other Commission programs¹¹¹ in the literature,¹¹² and in testimony before the AMC.¹¹³ Objections raised the following questions:

(a) *Is monetary relief necessary?* A common argument is that there is no need for section 13(b) monetary equitable relief.¹¹⁴ Private and state litigation will provide sufficient deterrence and compensation. The simple answers are that (i) if action is unnecessary, the FTC can—and under its policy should—refrain from seeking monetary reme-

109. Letter from Roxane C. Busey, Chair, Section of Antitrust Law, to Donald S. Clark, Esq., Sec'y to the Fed. Trade Comm'n 8 (Mar. 11, 2002), *available at* <http://www.abanet.org/antitrust/comments/2002/disgorge.pdf>. Although the ABA Antitrust section did not flatly oppose monetary equitable relief in competition cases, it noted that there would be "few factual circumstances" where it was needed to deprive a defendant of ill-gotten gains ("for example, if follow-on litigation appeared unlikely because total damages are small"). *Id.* at 8–9.

110. For indexed comments, see Fed. Trade Comm'n, *The Use of Disgorgement As a Remedy in Competition Cases: Public Comments*, <http://www.ftc.gov/os/comments/disgorgement/index.htm> (last visited Feb. 26, 2006).

111. See generally Balto, *supra* note 15; *FTC Workshop—Protecting Consumer Interests in Class Actions, September 13–14, 2004: Workshop Transcript: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 GEO. J. LEGAL ETHICS 1311 (2005) [hereinafter *FTC Workshop*].

112. See Areeda, *supra* note 16.

113. *Government Civil Remedies: Hearing Before the Antitrust Modernization Comm'n* (2005) (written testimony of Kevin Arquit) [hereinafter *Arquit*], *available at* http://www.amc.gov/commission_hearings/pdf/Statement_Arquit.pdf; see also Antitrust Modernization Comm'n, *supra* note 46 (remarks of Kevin Arquit).

114. See Arquit, *supra* note 113, at 2 ("[P]ublic and private enforcement mesh together to form a complete enforcement scheme that provides deterrence and compensates victims."); Balto, *supra* note 15, at 1122 ("First, it is not necessary to compensate consumers for anticompetitive harm because there are usually private direct and indirect purchaser actions pending at the time the agency enters its consent decrees."); Kenneth G. Starling, *Criminal Antitrust Enforcement*, 57 ANTITRUST L.J. 157, 158 (1988) ("[I]f there were unrecovered overcharges in such matters, private plaintiffs or state attorneys general would have pursued them already, or will pursue them in the future, if there is sufficient incentive."); Letter from Kenneth G. Starling to Donald S. Clark, Sec'y, Fed. Trade Comm'n (Feb. 6, 2002), *available at* <http://www.ftc.gov/os/comments/disgorgement/starling.pdf> (submitted to the FTC as comment on disgorgement).

dies, and (ii) logic suggests and experience with physician price coordination proves that this additional remedy is needed.¹¹⁵

(b) *Will monetary relief result in duplicative recoveries?* Several commentators worry that the FTC's use of section 13(b) will result in duplicative recoveries.¹¹⁶ One answer is that the FTC policy expressly states that the Commission "is sensitive to the interest in avoiding duplicative recoveries by injured persons or 'excessive' multiple payments by defendants for the same injury," and the policy bars double recovery for injuries¹¹⁷—apparently notwithstanding the antitrust laws' prescription of *treble* damages. Another answer is that in practice, the Commission has proven its sensitivity to this issue by how it has structured its 13(b) settlements.

At least three issues relating to multiple recoveries remain unresolved. First, would private recovery of single damages prevent the FTC from awarding money through section 13(b)? The FTC policy suggests that it would, at least if it achieved sufficiently substantial disgorgement. Second, would a direct purchaser's private recovery prevent the FTC from awarding money to an indirect purchaser? Here, the FTC statement promises sensitivity but not an absolute bar, and rightly so. So long as a defendant has not finished disgorging ill-gotten gains, there is no reason not to make injured individuals whole.¹¹⁸

115. Another example of a government injunctive order not followed by private litigation is provided by *United States v. Mathworks, Inc.*, 2003 U.S. Dist. LEXIS 4622 (E.D. Va. Mar. 6, 2003) (final judgment entered), in which a consent judgment resolving a complaint alleging per se illegality was not followed by any private suit alleging injury from an antitrust violation. E-mail from Richard Rosen, Partner, Arnold & Porter, to Stephen Calkins, Professor, Wayne State Univ. Law Sch. (Dec. 29, 2005). It also appears that no money was paid in private damages following *United States v. Village Voice Media, LLC*, 68 Fed. Reg. 7132 (Feb. 12, 2003) (proposed final judgment and competitive impact statement). An action by former employees was dismissed for want of standing. *Shaker v. Village Voice Media, Inc.*, 2005 U.S. Dist. LEXIS 10343 (N.D. Ohio May 25, 2005). Neither that opinion nor any other reported opinion refers to any successful private action. A July 2004 report indicated that class action status was being sought, *Lawyers & Settlements, Law Suits Filed, Village Voice, Media* <http://www.lawyersandsettlements.com/case/villagevoice> (last visited Mar. 23, 2006), but the referenced lawyer's web site, Scott Meyer, Home Page, <http://www.myerlawfirm.com/scottmyer.htm> (last visited Mar. 23, 2006), contains no mention of any such lawsuit.

116. See Arquit, *supra* note 113, at 4–5; Balto, *supra* note 15, at 1123 ("First, the use of Section 13(b) poses a significant risk of duplicative recovery."); Johnson, *supra* note 48, at 1027–30; *FTC Workshop*, *supra* note 111, at 1315 (remarks of Kenneth Gallo) ("I think there's at least the potential for serious duplicative recovery in antitrust cases . . ."). Mr. Gallo quite properly disclosed that he had worked on one of the recent disgorgement cases.

117. FTC Policy Statement, *supra* note 8, at 90.

118. Some commentators view *Illinois Brick* as an important policy decision to keep federal compensation away from indirect purchasers. Cf., e.g., *FTC Workshop*, *supra* note

Third, what if the FTC distribution occurs first, and a year later a private cause of action is filed? Does this “create enormous logistical problems to be sure that the same consumers aren’t getting redress twice and that the defendant isn’t paying twice[?]”¹¹⁹ But this has never happened,¹²⁰ and the chance of it happening is remote, given incentives for prompt filing of private claims, normal delay in FTC actions, and statutes of limitations. Nor, in a system of penalties in which *treble* damages is the theoretical norm, should the prospect of a possible rare award of *double* damages be horrifying. This implausible hypothetical is no reason to object to an otherwise desirable remedy.

(c) *Isn’t this all too complicated?* Another theme is the plea for relative simplicity, or, at least, the suggestion that monetary equitable relief would unreasonably complicate already complicated proceedings. But the FTC’s participation can simplify proceedings by facilitating a national settlement.¹²¹ And where there otherwise would be no recovery and no disgorgement of wrongfully held gains, some additional procedural steps are worth taking.

(d) *Even if the policy is sound in theory, can it work in practice?* Proof of what would have happened had a different road been taken is exceedingly difficult. Commentator Gallo noted the reasonableness of the FTC’s policies but added that his “problem” is that “I don’t think it’s actually worked out that way.”¹²² Critics point especially to the *Hearst Trust* case, in which the Commission challenged what it said was a merger to monopoly through violation of the Hart-Scott-Rodino pre-

111, at 1317 (comments of Kenneth Gallo). The legal and policy issues are well debated by the dueling statements in *Mylan*. See Press Release, Fed. Trade Comm’n, FTC Reaches Record Financial Settlement to Settle Charges of Price-Fixing in Generic Drug Market (Nov. 29, 2000), available at <http://www.ftc.gov/opa/2000/11/mylanfin.htm>. The heart of *Illinois Brick* is not about protecting defendants, but rather about avoiding undue complexity. See Stephen Calkins, *Illinois Brick and Its Legislative Aftermath*, 47 ANTITRUST L.J. 967, 970 (1978). Where a relatively straightforward disgorgement action is necessary to deprive a wrong-doer of ill-gotten gains, the fact that indirect purchasers will benefit from this is no reason not to proceed (although the set-off implications are more tricky, see *Health Care and Competition, Law and Policy: Hearing Before the Fed. Trade Comm’n & the Dep’t of Justice*, 22 (2003) [hereinafter Orlans Remarks] (remarks of Melvin H. Orlans)). As a practical matter, of course, total payments have rarely if ever surpassed government estimates of single damages.

119. *FTC Workshop*, *supra* note 111, at 1317 (comments of Kenneth Gallo).

120. *Id.* at 1316–17.

121. See O’Connor, *supra* note 93.

122. *FTC Workshop*, *supra* note 111, at 1316 (comments of Kenneth Gallo); see also Arquit, *supra* note 113, at 8 (“Indeed, the examples cited in the *Policy Statement* . . . undermine the Commission’s arguments that it can identify situations in which its monetary remedies can usefully add to private action.”).

merger notification program.¹²³ The premerger notification allegation was resolved by payment of \$4 million in civil penalties.¹²⁴ The monopolization allegation was resolved by divestiture and disgorgement of \$19 million.¹²⁵ Although Commissioners Anthony and Thompson wrote that without disgorgement, the asset divestiture alone "might have allowed Hearst to profit from its unlawful behavior,"¹²⁶ Commissioner Leary described the case as "a classic example of a situation where the remedy is unnecessary, if not affirmatively harmful."¹²⁷ He explained that the \$19 million would be turned over to the plaintiffs' counsel who filed actions shortly after the Commission filed its case and included in the total settlement of \$26 million. He speculated that without disgorgement, the Commission might well have won a larger civil penalty, which is not offset against the private damages, such that the effect of the Commission's seeking disgorgement could well be "that the parties will wind up paying less money" in combined penalties/disgorgement/damages.¹²⁸ Another consequence of the FTC obtaining disgorgement was that the direct plaintiffs' attorneys fees were limited to thirty percent of the incremental amount attributable to their efforts, which the court computed as \$8 million, yielding a fee of only \$2.4 million.¹²⁹

123. Press Release, Fed. Trade Comm'n, FTC Charges Hearst Trust with Acquiring Monopoly in Vital Drug Information Market (Apr. 4, 2001), *available at* <http://www.ftc.gov/opa/2001/04/hearst.htm>.

124. Press Release, Fed. Trade Comm'n, The Hearst Corporation Settles Charges of Filing Incomplete Pre-merger Report (Oct. 11, 2001), *available at* <http://www.ftc.gov/opa/2001/10/hearst.htm>.

125. Press Release, Fed. Trade Comm'n, Hearst Corp. to Disgorge \$19 Million and Divest Business to Facts and Comparisons to Settle FTC Complaint (Dec. 14, 2001), *available at* <http://www.ftc.gov/opa/2001/12/hearst.htm>.

126. Statement of Comm'rs Sheila F. Anthony & Mozelle W. Thompson, The Hearst Trust et al., File No. 991-0323 (Dec. 14, 2001), *available at* <http://www.ftc.gov/os/2001/12/anthstate.htm>.

127. Statement of Comm'r Thomas B. Leary, Concurring in Part and Dissenting in Part, Federal Trade Comm'n v. The Hearst Trust, File No. 991-0323 (Dec. 14, 2001), *available at* <http://www.ftc.gov/os/2001/12/learystate.htm>; *see also* *FTC Workshop*, *supra* note 111, at 1316 (comments of Kenneth Gallo).

128. *Id.* Commissioner Leary was suitably cautious about this suggestion, noting that "hypothetical predictions about the 'but for' world are always risky." *Id.*; *see also* Statement of Comm'r Orson Swindle, Concurring, Federal Trade Comm'n v. The Hearst Trust, File No. 991-0323 (Dec. 14, 2001) ("One thing seems clear: because the Commission's \$19 million in disgorgement will be subtracted from the at least \$26 million obtained against defendants by class action plaintiffs, the Commission's months-long pursuit of disgorgement has yielded a monetary recovery that adds no real value to the private remedy.").

129. *In re* First Databank Antitrust Litig., 209 F. Supp. 2d 96, 101 (D.D.C. 2002). The FTC intervened to object to the attorneys' fee being based on an amount that included the disgorgement obtained by the Commission. *Id.* at 98.

The reality is that the counterfactual is very hard to prove. When the Commission filed its *Hearst Trust* lawsuit, no private class actions were pending, and the Commission believed that absent a disgorgement action, defendants “would be likely to retain their ill-gotten gains.”¹³⁰ This seems a reasonable belief, since the alternative—an administrative challenge to a merger—rarely stimulates follow-on litigation,¹³¹ and the Commission’s other basis for a challenge (violation of the Hart-Scott-Rodino Act) does not create a private cause of action.¹³² Of course, shortly after the Commission filed its disgorgement action multiple class actions *were* filed, but that proves little about what would have happened had the Commission taken the alternative course; it is much easier for private litigants to share in disgorged profits than, for instance, to prove that a merger is unlawful and caused them antitrust injury.¹³³ It is thus entirely possible, and perhaps even likely, that disgorgement occurred only because of the FTC’s lawsuit.¹³⁴

130. Orlans Remarks, *supra* note 118, at 19; see also Statement of Chairman Pitofsky & Comm’rs Sheila F. Anthony & Mozelle W. Thompson, First Databank (Apr. 4, 2001) (“The alternative [to a disgorgement action], which would simply restore competition by divesting illegally acquired assets, is inadequate because it allows the respondent to walk off with profits gained as a result of its allegedly illegal behavior.”). *But cf.* Dissenting Statement of Comm’rs Orson Swindle & Thomas B. Leary, *Hearst Trust and Hearst Corporation’s Acquisition of J.B. Laughrey, Inc.* (Apr. 4, 2001), available at <http://www.ftc.gov/os/2001/04/hearstdiswinleary.htm> (“Without expressing a view on whether that extraordinary remedy should ever be available in an antitrust case, we believe that, if a violation is proved, existing private remedies are adequate to ensure that respondents do not benefit from any possible wrongdoing and that their customers can be made whole.”).

131. For instance, I believe that no follow-on lawsuits have been filed in *In re Evanston Nw. Healthcare Corp.*, No. 9315, 2005 WL 2845790 (F.T.C. Oct. 20, 2005).

132. See Orlans Remarks, *supra* note 118, at 19–20.

133. Clayton Act section 5 specifically provides that “in any action of proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission” 15 U.S.C. § 16(a) (2000). Nor are FTC decisions *prima facie* evidence in private antitrust suits. *Id.*

134. One could ask a different question: not whether there would have been disgorgement without FTC action, but whether the FTC, having stimulated private lawsuits by suing for disgorgement, should then settle what it considered a meritorious case without obtaining disgorgement (reasoning that it’s mission had been accomplished). By the time the FTC filed its case, however, its work was almost completed. It had conducted “an exhaustive 20-month investigation” costing more than 25,000 hours. *In re First Databank Antitrust Litig.*, 209 F. Supp. 2d 96, 97 (D.D.C. 2002). Less than a week later, defendants offered to settle the case by disgorging \$16 million. *Id.* Little would have been gained by the FTC abandoning disgorgement at that point, and much could have been lost were the FTC, having done all the work, to have left resolution of the dispute to private lawyers who might or might not act in the public interest—and were the FTC to create a precedent that would make suspect the bonafides of the next disgorgement case it filed.

Commentators also have complained about the FTC's *Mylan* case. It has been pointed out that by the time the FTC settled that case, multiple private and state cases were pending, and the money obtained by the FTC went into a fund administered by the states.¹³⁵ But once again, when the Commission decided how to proceed, no private actions were pending.¹³⁶ The Commission doubted that full disgorgement was likely absent its action, because the direct purchasers were large drug wholesalers who might be reluctant to sue the pharmaceutical companies with whom they regularly dealt, especially where the wholesalers had largely passed on any price increase or even benefited from a price increase when the percentage fee yielded more generous payments.¹³⁷ Also, as in *Hearst Trust*, the Commission's lawsuit stimulated private litigation—but, once again, that consequence does not prove what would have happened had the Commission not sought disgorgement.¹³⁸

(e) *Will monetary equitable relief lure the FTC away from its special mission?* In his eloquent dissent in *Mylan*, Commissioner Leary warned that this kind of use of section 13(b) was "almost too expedient and, dare I say, too seductive. It transforms the Commission into a prosecu-

135. See Balto, *supra* note 15, at 1120–21, 1124; *FTC Workshop*, *supra* note 111, at 1317 (comments of Kenneth Gallo). Commissioner Leary dissented from the Commission's accepting of disgorgement in *Mylan* not because the remedy made no difference but rather because he had fundamental objections to the Commission's use of section 13(b) in these cases. See Statement of Comm'r Thomas B. Leary, Dissenting in Part and Concurring in Part, *Federal Trade Commission v. Mylan Pharmaceuticals, Inc. et al.*, FTC File No. X990015 (Nov. 29, 2000), available at <http://www.ftc.gov/os/2000/11/mylanlearystatement.htm>.

136. Orlans Remarks, *supra* note 118, at 17.

137. *Id.*; see also *More Than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773, 836 (2005) (comments of Robert Pitofsky) ("A simple cease-and-desist order would not have affected Mylan's profits [more than \$120 million in wrongfully additional profits a year], and consumers who paid monopoly prices to pharmacies for the drugs—often elderly consumers on fixed incomes—did not purchase directly from Mylan and probably were not entitled to damages under federal law.").

138. Orlans Remarks, *supra* note 118, at 18–19. ("Notably, the direct purchaser class action settled quite late and I think fairly cheaply, and that was because as the Commission had originally envisioned, many of the drug wholesalers opted of that class action."). When it issued the complaint in *Mylan*, the Commission announced that it was seeking at least \$120 million in disgorgement or restitution. Press Release, Fed. Trade Comm'n, *Mylan, Nation's Second Largest Generic Drug Maker, Charged with Restraint of Trade, Conspiracy & Monopolization* (Dec. 21, 1998), available at <http://www.ftc.gov/opa/1998/12/mylanpv.htm>.

tor with an immensely powerful antitrust weapon.”¹³⁹ This is not the mission of the FTC, he argued: “Our traditional role in competition matters has been to look forward rather than backward, to articulate the law where the law is uncertain, and to seek relief that is prospective and remedial rather than retrospective and punitive.”¹⁴⁰

This is a legitimate concern. The FTC *does* have a special role to play.¹⁴¹ The FTC’s Bureau of Consumer Protection has become something of a lean, mean, court-litigating machine, but at the very real cost of largely depriving consumer protection of any adjudicative contributions from the Commissioners.¹⁴² Were the Commission to become merely a filer of federal court complaints, the talents of existing Commissioners would be wasted and the chance of attracting talented successors reduced.

Although the concern is thus legitimate, it is hard to see how a disgorgement case every couple of years poses a serious threat to the Commission’s mission. Yes, as Commissioner Leary noted, these actions can be “seductive,” and, yes, it is important not to be seduced, or at least not too often. The evidence thus far suggests that the Commission is fully capable of exercising restraint.

III. Serious Consideration Should Be Given to Making Monetary Relief an Option for Selected Civil Antitrust Division Cases

Many of the same reasons why it makes sense for the FTC to be able to obtain monetary redress for selected antitrust violations counsel in favor of establishing a program through which monetary relief would be an option for selected DOJ Antitrust Division cases. As Assistant Attorney General Pate observed, civil fines could supply important additional deterrence while also aligning the United States system of remedies more closely with foreign legal systems.¹⁴³ At present, at least in practice, antitrust violations are of varying severity, but the

139. Statement of Comm’r Thomas B. Leary, Dissenting in Part and Concurring in Part, *Fed. Trade Comm’n v. Mylan Pharms., Inc.* et al., FTC File No. X990015 (Nov. 29, 2000), available at <http://www.ftc.gov/os/2000/11/mylanlearystatement.htm>.

140. *Id.* David Balto also has vigorously stressed the same “special mission” theme. Balto, *supra* note 15, at 1123.

141. This is one the themes of the second Kirkpatrick Report. See Kirkpatrick et al., *supra* note 87.

142. The Commission’s recent opinion in *Telebrands Corp.*, No. 9313, 2005 WL 2395790 (Sept. 19, 2005 F.T.C.), was its first consumer protection opinion in more than five years.

143. See Pate, *supra* note 18, at 2 (endorsing study of possible civil fines and accompanying “adjustments to private damages remedies”).

Antitrust Division is limited to choosing between indictments and injunctive relief. This disconnect could be addressed most neatly through legislation creating civil fines or penalties for antitrust violations,¹⁴⁴ but alternative solutions also exist.

The problem should not be overstated. The private bar usually can be counted on to follow government actions with lawsuits seeking treble damages. The states also can obtain monetary relief—indeed, it is not uncommon for a federal injunctive consent to be announced concurrently with a state consent requiring payments,¹⁴⁵ and for purposes of deterrence and compensation, it does not matter whether the conduit is federal or state. As this Article has reviewed at length, moreover, the FTC can obtain monetary equitable relief, and nothing save pride of place would prevent the Justice Department from referring to the FTC an antitrust investigation in which such relief would be especially appropriate.

One other way that additional deterrence could be achieved would be for the Antitrust Division to seek to establish its right to obtain equitable relief just as the FTC does. The Justice Department appears to have taken the position, in the context of litigating disgorgement under RICO, that the Sherman Act's empowering of district courts "to prevent and restrain violations" of the Act authorizes the courts to award disgorgement to the government.¹⁴⁶ Others

144. Any such legislation should authorize the penalties to be sought by either antitrust agency. The FTC currently brings many civil penalty cases, *Antitrust Law Developments (Fifth)*, *supra* note 11, at 662–65, and there is no reason to create a civil remedy for one agency but not the other.

145. See, e.g., Press Release, U.S. Dept. of Justice, Justice Department Requires Hospitals to Enter into Enforcement Order to Remedy Consent Decree Violations (July 12, 2000), available at http://www.usdoj.gov/atr/public/press_releases/2000/5147.htm (consent order requires defendants to pay \$300,000 civil penalty and \$200,000 costs to Florida). In *United States v. Village Voice Media, LLC*, advertisers were given the opportunity to renegotiate contracts, and such money as was disgorged went to the states, with California receiving \$610,000 in civil penalties and \$140,000 in attorney's fees and costs. California Settles Antitrust Litigation Against Alternative Weeklies Publishers, 84 Antitrust & Trade Reg. Rep. (BNA) 90 (Jan. 31, 2003). The parties also paid \$20,000 in attorneys fees and \$45,000 in "civil forfeitures" to Ohio. See Press Release, Ohio Attorney Gen., Alternative Papers Agree to End Illegal Market Practices; Village Voice Media and NT Media Settle with Attorneys General (Jan. 27, 2003), available at http://www.ag.state.oh.us/press/03/01/press_release_20030127_3.asp.

146. Reply Brief for the United States on Petition for a Writ of Certiorari at 4 & n.3, *United States v. Philip Morris USA, Inc.*, 126 S. Ct. 478 (2005) (No. 05-92) (citing *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1221–22 (D.C. Cir. 2005) (Tatel, J., dissenting)) (certiorari was denied). Almost fifty years ago, the Justice Department sought without success to persuade an antitrust court to rely on its general equitable powers to benefit what it saw as a wronged third party. *United States v. Loew's, Inc.*, 189 F. Supp. 373, 399 (S.D.N.Y. 1960), *vacated and remanded*, 371 U.S. 38 (1962) ("Nowhere in the statute,

agree.¹⁴⁷ Depending on how litigation of related issues progresses through the courts, the Antitrust Division might decide to act on this view.

The cleanest way to help the Division address these mid-situation cases would be for Congress to authorize the Division and the FTC to seek civil fines or penalties in antitrust cases. Fines and penalties have the benefit of helping to deter illegal conduct that does not result in gains suitable for disgorgement (for instance, because the wrongdoing is stopped at an early stage). Another benefit of a system of civil fines or penalties is that it would keep the Antitrust Division firmly in the business of challenging civil antitrust violations.¹⁴⁸

Formal authorization of fines or penalties would not be without some risk. There is always some chance of abuse, especially if the monies could be seen as aiding in supporting an agency's budget requests. Beyond that, civil fines or penalties could be viewed as another issue over which to bargain as part of settlement. If defendants came to believe they could avoid indictment (especially of individuals) by offering to pay large sums civilly, or if government lawyers were ever persuaded to listen favorably to such an argument, great harm could be done to the Division's criminal enforcement program, which is universally regarded as its crown jewel.

Were the antitrust agencies authorized to impose civil fines or penalties for antitrust violations, coordination with private damages actions would be necessary. Even if general antitrust deterrence is too low, there is no reason why a few unlucky defendants should be singled out potentially to pay a civil fine plus treble damages (or perhaps more, to different classes of purchasers). If overall damages and penalties are too low, increase them. Although compensation of victims is a virtue, the principal point of creating civil fine or penalty authority should be to make sure that wrongdoers identified by the antitrust agencies part with sufficient funds so that others will be deterred. It

however, is there any authority to require a defendant in a government antitrust case to refund that which it has received, even under an illegal contract, and to pay that amount to a private party not a party to the action.") (DOJ successfully objected on other grounds to inadequacy of remedy).

147. See Leary Statement, *supra* note 107, at 7 ("It is reasonable to assume that the DOJ could get similar [monetary equitable] relief, under Section 4 of the Sherman Act, 15 U.S.C. § 4, and Section 15 of the Clayton Act, 15 U.S.C. § 25 . . ."). Of course, critics of the FTC's monetary equitable relief program likely would argue that the Division similarly lacks authority.

148. Although some might favor letting the FTC specialize in non-criminal antitrust, I prefer to have both agencies address a spectrum of conduct.

makes no difference, for purposes of deterrence, whether money is paid to the government or to a private claimant.¹⁴⁹

Nothing would prevent Congress from authorizing a fine and specifying that the moneys be made available for injured persons. An example of this can be found in the SEC's new "fair fund" authority, which provides that civil penalties may be added to disgorgement funds to aid victims.¹⁵⁰ Presumably, a civil penalty could be held in escrow for a period of time and refunded to the extent that equal amounts are paid out in damages. It makes sense to favor payments to victims over payments to the general treasury, both as a matter of equity and as an incentive to inform the government about violations.

More generally, it makes sense to work towards achieving better remedies for that middle class of cases brought by the Antitrust Division. This could be accomplished through legislation, and there is a substantial argument to pursuing this course. Given the inevitable risks any time Congress acts, however, and given the uncertain results of creating a formal program of fines and penalties, it might be more prudent for the Division to work on using the authority already available to it—by working with states that can extract payments, by referring cases to the FTC, and perhaps by seeking to use its own inherent equitable authority.

149. One group of commentators, while recognizing the important role of the government antitrust agencies, opposed civil fines out of fear that "displacement of private remedies would reduce enforcement of the antitrust laws, and should be disfavored." AAI REMEDIES COMMENT, *supra* note 49, at 13. Yet displacement of \$X of damages by an equal amount of penalties would leave deterrence unchanged. Deterrence would be reduced only were total resources available to fund private "attorneys general" to fall below some critical level needed to preserve effective private litigators, which seems unlikely; or if a particular case saw just enough displacement as to make it no longer worth pursuing privately, which could not happen very often; or if the displacement was keyed to single damages, such that a \$10 million civil penalty displaced not \$10 million in damages, but \$30 million. Given the paucity of government civil antitrust litigation, *see* Calkins, *supra* note 4, at 156, no effect would seem very large; but, in any event, the largest effect could be prevented simply by keying any displacement to the amount of actual paid damages foregone. And the problem could be prevented in its entirety simply by having the fines made payable only to the extent that damages are not.

150. 15 U.S.C. § 7246 (2000); *see* Douglas A. Henry, Comment, *Subordinating Subordination: Worldcom and the Effect of Sarbanes-Oxley's Fair Funds Provision on Distributions in Bankruptcy*, 21 BANKR. DEV. J. 259 (2004). The SEC is very thoughtfully addressing the computation and allocation of penalties, thereby providing a good example for the antitrust community. *See* Press Release, U.S. Sec. & Exch. Comm'n, Statement of the Securities and Exchange Commission Concerning Financial Penalties, Release 2006-4 (Jan. 4, 2006), available at <http://www.sec.gov/news/press/2006-4.htm>.

Conclusion

The most important conclusion is the most obvious: the FTC is proceeding responsibly to use its monetary equitable relief authority, and this is no time for Congress to get involved. The rapid pace of judicial developments with respect to other monetary equitable relief issues provides further reason for Congress's taking no action at this time.

Whether Congress should consider creating civil fines is a harder question. The bottom line, however, is that the current system of "bi-modal penalties" makes little sense and imposes modest but real costs. Serious consideration should be given to addressing it—at least by the Division using authority currently available and perhaps by Congress considering adopting antitrust civil fines and penalties enforceable by the DOJ's Antitrust Division and the FTC.